72-1140

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In The

Supreme Court of the United States

October Term 1973

Docket No. 73- 72-1140

NICHOLAS GASPARINO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

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In The

Supreme Court of the United States

October Term 1973

Docket No. 73-

NICHOLAS GASPARINO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Statement

Petitioner, NICHOLAS GASPARINO, respectfully prays that this Court issue a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review its unanimous affirmance on October 24, 1972, of the conviction of the petitioner in the County Court, Westchester County, for the crime of conspiracy in the first degree. The New York Court of Appeals denied leave to appeal on the 21st day of November, 1972.

The petitioner has been sentenced to 15 years imprisonment and is presently incarcerated.

Opinion Below

The Appellate Division, Second Department, rendered no opinion in connection with this case. A copy of the order of affirmance is annexed however.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The Court of Appeals denied leave to appeal on November 21, 1972.

Questions Presented

1. Whether petitioner's rights under the Fifth and Fourteenth Amendments, against compulsory self-incrimination, were violated by virtue of the prosecutor's misrepresentation in offering him immunity before the Grand Jury and then indicting him for the very crime about which he was compelled to testify?

(a) Under New York law, the immunity conferred was necessarily transactional and not merely testimonial.

2. Whether petitioner's rights under the Fifth and Fourteenth Amendments were violated by the prosecutor's decision to retroactively vitiate the immunity granted petitioner by the Grand Jury

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because petitioner declined to testify at a subsequent trial?

3. Whether the conferral of immunity by a Grand Jury contains an implicit condition subsequent that the immunized witness must also testify at subsequent trial proceedings?

4. Whether a witness who has received immunity from prosecution before a Grand Jury may be indicted for the offense about which he was compelled to testify because he subsequently refused to give evidence at a later trial or is the sole remedy of the prosecutor a proceeding to hold such a recalcitrant witness in contempt?

5. Whether petitioner was intimidated into testifying before a Grand Jury by being held in a quarter of a million dollars bail as a mere material witness, with the implied promise that he could be released only by agreeing to testify before the Grand Jury (Fifth and Fourteenth Amendments)?

6. Whether petitioner was denied a speedy trial in violation of the Sixth and Fourteenth Amendments of the United States Constitution?

Constitutional and Statutory Provisions Involved

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution; Article I, Section 6 of the New York State Constitution; Sections 395 and 619-c of the New York Code of Criminal Procedure; and Section 2447, former New York Penal Law (see 190.40 New York Criminal Procedure Law), are involved herein.

Essential Facts

This case presents an important issue involving conferral of immunity under the laws of the State of New York as they existed at the time that NICHOLAS GASPARINO, the petitioner herein, appeared before a 1968 Grand Jury on the 17th day of December, 1968, in Westchester County.

The petitioner herein was arrested as a material witness on the 5th day of December, 1968, and committed to the Westchester County Jail in lieu of $250,000.00 bail as a material witness in the alleged killing of one Dorothy De Tore.

Later this amount was reduced to $25,000.00. After consulting with his attorney, Vincent W. Lanna, Esq., who informed GASPARINO that he in turn had discussed the matter with Assistant District Attorney Warren Schneider of the District Attorney's office in Westchester County, who had promised complete immunity in exchange for his testimony before the Grand Jury, that he actually did testify before the Westchester County Grand Jury on or about the 17th day of December, 1968.

Both John De Tore and Kenneth Wedra were subsequently indicted for the murder of Dorothy De Tore under Indictment Number 1126/68.

In November of 1969, the petitioner was subpoenaed to testify as a witness at the trial of John De Tore and Kenneth Wedra, but declined to testify, as a result of which his bail was again

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raised to $250,000.00, causing him to be incarcerated again as a material witness (A63-65, 77).*

The District Attorney subsequently procured an indictment from a different Grand Jury, namely the December 1969 Grand Jury, which indicted petitioner for the murder of Dorothy De Tore despite the alleged conferral of immunity.

Because of the seriousness of the charge and the full statements given by the petitioner during his Grand Jury testimony, he had no course other than to plead guilty to the crime of conspiracy to commit murder.

A motion had been made, prior to his plea of guilty, to dismiss the Indictment on the grounds that he had received immunity against prosecution as a result of his testimony before the Grand Jury in 1968. This matter was taken to the Appellate Division on an Article 78 Proceeding in the nature of prohibition, but the Appellate Division denied this relief and the matter was remanded to the County Court for trial. The County Court ordered the case to proceed to trial, as a result of which GASPARINO, fearing that he could be incarcerated for life, bargained to obtain a plea of conspiracy to commit murder (Conspiracy, First Degree).

The Court sentenced petitioner to 15 years imprisonment and, as indicated in the preliminary Statement herein, the Appellate Division of the Second Department affirmed that conviction and the Court of Appeals denied leave to appeal.

* Parenthetical references are to the appendix on appeal.

An essential colloquy that occurred before the Grand Jury which crystallizes the foundation for Petitioner GASPARINO's belief that he was immunized, is set forth in Point I of the brief, infra.

Argument

Point I.

THE PETITIONER WAS DEPRIVED OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION BY VIRTUE OF THE PROSECUTOR'S MISREPRESENTATION IN OFFERING IMMUNITY BEFORE THE GRAND JURY AND THEN INDICTING HIM FOR THE VERY CRIME ABOUT WHICH HE WAS COMPELLED TO TESTIFY. THE IMMUNITY CONFERRED WAS NECESSARILY TRANSACTIONAL AND IT WAS PURE SOPHISTRY ON THE PART OF RESPONDENT TO CONTEND THAT IT WAS MERELY TESTIMONIAL.

This is a most distressing and unusual case. The petitioner herein, NICHOLAS GASPARINO, was indicted for the crime of murder after he had first been arrested as a material witness with respect to the very crime for which he was indicted and later compelled to testify as a witness before a Grand Jury investigating this same murder (the slaying of Dorothy De Tore).

The facts do not seem to be in material dispute, according to the opinion of Judge Beisheim in the Court below, since in his opinion he noted that GASPARINO had been promised immunity for his testimony, which was a sine qua non to the indict-

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ment of Kenneth Wedra and John De Tore, under Indictment No. 1126/68. In the opinion of Judge Beisheim it is apparent that this petitioner would not have testified had he not received immunity. There is no indication that the immunity pledged was to be testimonial nor was he warned that he could be indicted for this crime if he did not testify at the trial. Thus the following colloquy occurred in the Grand Jury, according to the Opinion of Judge Beisheim:

> "By Mr. Schneider:
>
> Q. And did there come a time when Vito spoke with you about something that was to be done on behalf of John De Tore? A. Yes sir. Excuse me. For a minute, may I say something? Mr. Lanna advised me to say that immunity should be said before I should say anything. I don't know what he means by that.
>
> Q. Well, you have been promised immunity by the day, have you not? A. Yes.
>
> Q. And I have now said it in front of the Grand Jury, have I not? A. Right. Thank you."

GASPARINO did testify in the Grand Jury, as a result of which an indictment was returned against Wedra and John De Tore. Both those persons were later brought to trial and convicted.

In his affidavit of February 11, 1970, Assistant District Attorney Warren Schneider said that he asked for immunity, but only intended that the

immunity be "testimonial." The statement is palpably unbelievable. The petitioner and his trial counsel were hoodwinked:

> "While the term immunity may have been used in conversations between myself and counsel for the defendant GASPARINO, it was used in an inexact sense. At no time did we ever discuss by specific term 'statutory' or 'transactional' immunity, and if transactional or statutory immunity had been requested by the defendant, the request would have been rejected and he would have been indicted, because it would have been totally senseless to permit one culpable party to go free simply to obtain an indictment against another culpable party without any reasonable assurance that the indictment could subsequently be successfully prosecuted. It was certainly my understanding at the time that Mr. Lanna understood that the consideration being extended to his client was upon condition not only of his Grand Jury testimony, but of his trial testimony as well. The defendant was given testimonial immunity in the Grand Jury because he was permitted to appear and testify without having executed a waiver of immunity. At no time did I request the Grand Jury to give the defendant statutory immunity; at no time did I request the Grand Jury to direct the defendant to answer any question or request the foreman to do so; at no time did the Grand Jury retire in closed session and vote upon any such matter

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or advise your deponent that it had done so, and at no time did I ever inform anyone that it had done so."

The petitioner and his trial counsel relied on the prosecutor's representation that immunity was conferred. It is shocking that he should append a condition subsequent to immunity. There is no basis for such a practice.

Nothing was said about trial testimony at all. Nothing was mentioned that immunity was only testimonial. There was moreover, a stipulation not to prosecute, irrespective of anything else (Code Crim. Proc. §395).

There is no denial of discussions about immunity, and thus immunity precluded prosecution.

As it turned out however, for reasons undisclosed in the record, the petitioner declined to testify at the trial. He was, of course, dealing with accused murderers and perhaps it was quite understandable why he would hesitate to testify under those circumstances. Be that as it may, the only course of action open to the prosecution at that juncture was to ask for a citation for contempt of court on the theory that GASPARINO had lost his privilege against self-incrimination by virtue of the immunity and thus could be compelled to testify notwithstanding the Fifth Amendment privilege. The cases are legion where this has occurred in various circumstances. (See People v. Tramunti, 29 N.Y.2d 28; People v. Masiello, 28 N.Y.2d 287; People v. Mulligan, 29 N.Y.2d 20; and, Matter of Gold v. Menna, 25 N.Y.2d 415).

As a matter of fact, when the case of People v. La Bello and Piccirillo, 24 N.Y.2d 598, came before the Supreme Court of the United States (400 U.S. 548), the case was remanded because our own Court of Appeals noted that immunity in New York conferred before a Grand Jury results in transactional and not testimonial immunity.

The Fifth Amendment privilege against self-incrimination must be interpreted in accordance with Federal standards and may not be emasculated by some "Pickwickian" dilution fabricated by a nisi prius Court. (See, Malloy v. Hogan, 378 U.S. 1; Murphy v. Waterfront Commission, 378 U.S. 52 and Gardner v. Broderick, 392 U.S. 273.)

We submit that the law of New York is not affected by the recent decision of the Supreme Court of the United States in Ziccarilli v. Investigation Com., 32 L. Ed.2d 234, decided May 1972, wherein the United States Supreme Court indicated that transactional immunity was not essential to the enforcement of the Fifth Amendment. That decision, however, sets a minimum standard and does not in any way overrule Matter of Gold v. Menna, supra, or Masiello, Mulligan, or cases of that sort.

We would ask this Court to review the Grand Jury Minutes herein, which it may do since a proper motion was made in the Courts below for dismissal, and we feel that it will determine that there is nothing whatsoever to indicate that transactional immunity was not being offered or that the immunity was contingent upon testimony by

the petitioner at the trial itself. Having agreed to testify before the Grand Jury under a grant of immunity and then actually testifying, GASPARINO did all that was required. A condition subsequent may not suddenly be engrafted to vitiate a proper conferral of immunity.

It should be noted that the affidavits submitted by the petitioner and by his experienced counsel, Vincent W. Lanna, Esq., were more than sufficient to indicate that, but for the promise of full immunity, there would not have been any testimony before the Grand Jury by this petitioner.

Under New York law, immunity, when granted, is deemed transactional and the recent case of Ziccarilli v. Investigation Commission, supra, has no effect upon New York law.

Indeed, it is submitted that because of the misrepresentations of the District Attorney, the petitioner and his counsel were lulled into a false sense of security.

Moreover, the jockeying around by the prosecutor of bail, which supposedly is required only to assure appearance in court, between $250,000.00 and $25,000.00, and then back up to $250,000.00 again, can only be interpreted as intimidation with the acquiescence of the Court.

The Indictment against Wedra and De Tore could not have been obtained without the testimony of GASPARINO, so, to that extent, he fulfilled his role before the Grand Jury and, had he declined to testify before that Grand Jury, perhaps he could

then have been indicted as a co-defendant of Wedra and De Tore.

GASPARINO was subpoenaed to testify at trial. His refusal to do so could be punished as contempt since he was a witness. His immunity however, could not be vacated retroactively since it had already resulted in a benefit to the prosecution, namely the procuring of the indictments against Wedra and De Tore. Moreover, it is inferable that the testimony of GASPARINO not only gave the prosecution an insight into his knowledge of the crime and his background, but supplied them with a good deal of information that they would not otherwise have obtained.

In Santobello v. New York, 404 U.S. 257 (1971), this Court held that a promise articulated by a prosecutor (in the case at bar, not to prosecute), must be fulfilled and a change in circumstances or change in heart cannot retroactively vitiate that promise.

There is nothing in the record to indicate that GASPARINO was told that his immunity was contingent not only on testifying before the Grand Jury, but also upon testifying in Court.

It should be noted that Wedra and De Tore were convicted of murder and were sentenced to 25 years to life.

GASPARINO, who had been held only as a material witness originally, later became a defendant in a separate indictment, to which he was compelled

to plead guilty when the Courts below refused to honor the commitments of the District Attorney or to enforce the grant of immunity.

The integrity of the judicial process itself is at stake here.

Point II.

THE PETITIONER WAS DENIED A SPEEDY TRIAL IN VIOLATION OF HIS RIGHTS UNDER SECTIONS 668 AND 8 OF THE CODE OF CRIMINAL PROCEDURE, CRIMINAL PROCEDURE LAW §§30.20, 170.30; AND 210.20; SECTION 12 OF THE CIVIL RIGHTS LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

On October 27, 1970, the petitioner moved to dismiss the indictment charging him with murder, which had been filed on December 16, 1969. According to the opinion of Judge Burchell, the County Judge who denied the motion, the petitioner was not arraigned on his December 16th indictment until July 30, 1970. On the 31st of August, 1970, the District Attorney placed this case on the ready trial calendar. The trial was finally not scheduled to commence until the 5th day of January, 1971, which was approximately 13 months after the indictment was returned.

It is submitted that there was no reason advanced that contained any cogency for delay during the last five months that this case appeared on the ready trial calendar before being called for

trial. Why was arraignment held up for eight months? GASPARINO, in the meantime, had languished in jail. It is the position of the petitioner that this unjustified and unexplained delay violated GASPARINO's rights under the Sixth and Fourteenth Amendments of the United States Constitution, and in violation of Section 12 of the Civil Rights Law and Sections 8 and 668 of the Code of Criminal Procedure.

The District Attorney's office was dilatory in another recent case, namely People v. Minicone, 28 N.Y.2d 279, cert. denied ___ U.S. ___. The Court of Appeals dismissed the indictment in that case.

Accord: People v. Winfrey, 20 N.Y.2d 138, 141. See also, Dickey v. Florida, 398 U.S. 30.

It is submitted that the recent cases of United States v. Marion, 404 U.S. 307 and Baker v. Wingo, 407 U.S. 514 (1972), do not alter the rule in New York requiring speedy trials. As a matter of fact, the latter two cases recognize that a balancing of interests is necessary in Federal practice to determine whether a speedy trial has been denied.

People v. Minicone, supra, and the recent rules for speedy trial promulgated in New York, leave no doubt that an unexplained delay of the type herein involved was prejudicial. The issue herein was preserved and the fact that a plea of guilty was interposed does not change the fact that the Court lost jurisdiction over the case by virtue of this delay.

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This, therefore, is another reason for reversal and dismissal of the indictment herein.

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina v. Robbins, 1 Cox C.C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on on his trial after such a lapse of time. How can he account for his conduct so far back?. . . [I]f the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe is such a prosecution were permitted. It would be very unjust to put him on trial." (Emphasis supplied.)

See,

> 5 Stan. L. Rev. 95, 104, 1952 "Justice Overdue — Speedy Trial for the Pre-Trial Defendant."

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In Pollard v. United States, 352 U.S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo, 350 U.S. 857

(1955), affirming Petition of Provoo, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from Pollard v. United States, supra, at 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. (See Mann v. United States, supra, 304 F.2d at 396-397, n. 4; Taylor v. United States, 238 F.2d 259 [D.C. Cir. 1956]; Nickens v. United States, 323 F.2d 807 [D.C. Cir. 1963]; United States v. Provoo, supra.) See 18 U.S.C. §3282.

In Godfrey v. United States, 358 F.2d 850, 852 (D.C. Cir., 1966), the Court of Appeals observed:

> "We note that although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purpose of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree. The disadvantage to the accused inherent in the deliberate preference accorded

> the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

In United States v. Godfrey, 243 F. Supp. 830, 831 (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

> "The reasonableness vel non of the delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case . . . ."

See also Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). In Ross, the Court of Appeals (249 F.2d at 211) proclaimed:

> ". . . We think a record of this kind more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue, centering around Appellant's ability to defend himself."

See People v. Winfrey, supra.

In Ross, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in Ross v. United States, supra, the Court was not merely articulating its

supervisory power over district courts in Washington, D.C.

In Baker v. Wingo, supra, this Court affirmed but held that a defendant's Constitutional right to speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and of the defendant are weighed. The Court should assess such factors as the length of and the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

It is submitted that in the case at bar the prosecution virtually conceded that it had no specific reason for the delay except that perhaps it was remiss in bringing it before the Grand Jury.

We do not believe that Marion can be read as permitting an arbitrary delay by the prosecution in violation of the Fifth and Sixth Amendments.

We ask the Court rhetorically, of course, whether it would agree that a persons' memory of past events is likely to be more accurate several months after the event or five years after the event? We of course believe the answer is obvious and, therefore, submit that this fact in itself warrants a conclusion that prejudice occurred in this case.

It is difficult to pinpoint actual "prejudice" because events may have occurred which were forgotten or which were not given significance

owing to the ignorance on the part of the petitioner that an indictment would eventually be sought. As was stated in the brief below in this case, the delay is even more virulent where a defendant is unaware that charges are pending than where he is aware of those charges. In the former case, he has no reason to preserve papers or keep in touch with persons who may be of help and, in general, lapses into a feeling of complacency. In the latter situation, at least the defendant is aware of the charges and can make efforts to preserve his records, keep in touch with possible witnesses and prepare to defend himself eventually.

We would ask the Court to consider the recent case of United States v. Vuitch, 402 U.S. 61, where the Supreme Court indicated that the Government must carry the burden of proof in all cases. Even where there may be an affirmative defense, the Government must disprove its existence.

In essence, the ruling of the Court below means that despite the fact that a defendant raises the issue of speedy trial under the Constitution, the burden rests upon the defendant to prove that the Government denied him a speedy trial to his prejudice and it is not enough that he prove that speedy justice was simply denied.

In other words, although in the case at bar there is a classic situation of an unconscionable delay without justification in bringing a case to trial, the Court below reasons that because the petitioner failed to prove he was actually prejudiced, that no violation has occurred.

We would ask what is the significance of the Fifth and Sixth Amendments if this is the way the speedy trial provision is to be interpreted! What the Marion case has accomplished is an actual repeal of the Sixth Amendment right to speedy trial without the necessity of going through the elaborate procedures necessary to amend or change the Constitution.

We would also respectfully point out that placing the burden of proof of denial of speedy justice with prejudice upon the defendant, may violate the self-incrimination clause of the Fifth Amendment since such proof oft-times can be adduced only through the testimony of the defendant and where a defendant elects not to testify under the Fifth Amendment, he may find himself in the dilemma of having to waive his Sixth Amendment rights. No person accused of a crime should be placed in such a predicament.

We ask this Court to determine whether or not a speedy trial was denied in the Constitutional sense.

The recent rulings of this court in United States v. Marion and Baker v. Wingo, supra, have left the Bench and Bar in a state of confusion to some extent as to what was intended with respect to speedy justice.

The law of New York is clear that the trial should have been commenced at the term next following the return of the indictment but, of course, this was not done. A motion to dismiss had been

made but, without sufficient cause shown by the prosecutor for the delay, the Court nevertheless denied the motion. It is submitted this question also rises to Constitutional dimension and we would ask this Court to grant certiorari and reverse on this basis as well (Criminal Procedure Law §§30.20; 170-30 and 210-20).

Conclusion

Certiorari should be granted and the conviction reversed.

Respectfully submitted,

s/ Irving Anolik
IRVING ANOLIK
Attorney for Petitioner

Order on Appeal from Judgment of Conviction

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 24, 1972

HON. SAMUEL RABIN, Presiding Justice
HON. HENRY J. LATHAM
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
Associate Justices

A-13-71

- - - -

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

Certificate Denying Leave

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL,
Associate Judge

[Same Title]

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated: New York, New York
November 21, 1972

s/ Charles D. Breitel
Associate Judge

*Irving Anolik, Esq.
225 Broadway
New York, New York 10007

**Hon. Carl A. Vergari
District Attorney, Westchester County
Court House
White Plains, New York

Certificate Denying Leave

Clerk, Court of Appeals

*Briefs returned at office and Appendix

**Brief returned at office

*Description of Order:

10-26-72 App. Div. 2d affmd. 2-16-71 Westchester Co. Ct.